



## Baxter International Inc.,

Opposer,

y.

Inviro Medical Devices Ltd.,

Applicant.

Opposition No. 91150298  
Application No. 76/151,380

02-04-2004

U.S. Patent &amp; TMO/c/TM Mail Rcpt Dt. #22

Pursuant to 37 C.F.R. 2.127, Inviro respectfully requests the Board's consideration of the following Reply Brief in support of Inviro's motion to add a second counterclaim based on Baxter's fraud information recently produced and confirmed by Baxter in December 2003. Inviro's Reply Brief corrects misstatements in Baxter's opposition to the motion and confirms the propriety of Inviro's promptly filed motion.

In addition, and pursuant to 37 C.F.R. 2.127, Inviro submits its Response Brief (Opposition) to Baxter's motion to amend its Notice of Opposition – which is an improper effort to cover-up its fraudulent procurement and maintenance of INTERLINK Registration No. 1,821,178.

## INVIRO'S REPLY BRIEF

At the outset, Inviro notes that it is a small, start-up company with three employees. As a result, Inviro will keep this Brief simple and straightforward in an effort to streamline this matter for the Board and to minimize expense to Inviro.

The substantive facts are not in dispute. First, Baxter never used the INTERLINK trademark on certain goods in its Registration No. 1,821,178. Second, Baxter never informed the U.S. Trademark Office of these facts when it filed its Declaration to obtain the registration, when it filed its Section 8 Declaration, when it filed its Section 15 Declaration, or at any other time. Baxter's 30(b)(6) witness unequivocally admitted these facts in his recent deposition, and Baxter's motion papers do not dispute these facts. (A copy of the sworn Baxter testimony will be supplied as soon as Baxter's witness signs it.) These undisputed facts are the basis for Inviro's motion to add a second counterclaim requesting cancellation of Registration No. 1,821,178.

Instead of dealing with the substance of Baxter's fraudulent actions and inactions in its opposition brief (see pages 2-3 of Baxter's brief), Baxter attempts to pin the blame on Inviro for raising this issue near the end of discovery. This is not Inviro's fault. Indeed, Baxter was in possession of this fraud information – not Inviro. Inviro is the party that recently uncovered the fraud and should not be penalized for promptly seeking amendment in a proceeding where Baxter is asserting the registration against Inviro.

Moreover, Inviro has been seeking Baxter's alleged trademark usage information from the outset in this case, and has repeatedly requested that Baxter provide its usage information and supplement its discovery – including documentation on usage. On December 4, 2004 (a little more than one week before Baxter was to be deposed), Baxter supplied Inviro with its supplemental discovery responses and documents. See Exhibit A, which are copies of Inviro's October request for Baxter's supplementation of discovery, and Baxter's December reply. This Baxter document production in December 2003, confirmed Baxter's lack of usage of the INTERLINK trademark.

About one week later, on December 16-17, 2003, Inviro obtained Baxter's sworn testimony confirming that Baxter had never used the INTERLINK trademark on various goods and that Baxter

had never informed the U.S. Trademark Office of this non-usage in its Declaration that resulted in the issuance of the Registration, in its Section 8 Declaration, or in its Section 15 Declaration.

Contrary to Baxter's statements that Inviro waited until the end of discovery in December to conduct depositions, both parties agreed to take depositions at this time in December because the proceeding had just been resumed by the Board at the very end of September (i.e., the proceeding was suspended for most of 2003) and both parties agreed to supplement their discovery before taking depositions. More specifically, the parties agreed to supplement their written discovery in October and November 2003, followed by depositions in December 2003. In this regard, Inviro sent its deposition notice to Baxter on November 5, 2003, and set the Baxter deposition date for December 5, 2003 (which Inviro reset to December 16-17 – at the specific request of Baxter). See Exhibit B. Confirming this same timing of December depositions of the parties, Baxter sent its deposition notice to Inviro on the same day -- November 5, 2003, and set the Inviro deposition date for December 8, 2003. See Exhibit C. Now, Baxter should not be heard to complain about this previously agreed upon timing of discovery and depositions.

On pages 1 and 3 of its opposition brief, Baxter complains that it needs "additional discovery" of its own situation. This complaint rings hollow. As Baxter stated in another portion of its brief, this proceeding has been in the discovery phase for two years. During that time or prior to assertion of its registration, Baxter should have conducted its own discovery of its own situation.

Inviro also notes that the sole case (*Lone Star*) cited by Baxter in its brief does not support any of Baxter's positions or proposals. Baxter's brief misleads the Board about the controlling facts of that case, which denied a motion to amend. Indeed, the *Lone Star* case involves completely different facts, i.e., the movant tried to belatedly amend its pleading after the close of discovery based on information in "[its] possession before the original answer was filed, well before the close

of the discovery period." *Lone Star Steakhouse & Saloon v. Alpha of Virginia*, 33 USPQ2d 1481, 1495 (4<sup>th</sup> Cir. 1995). This merely highlights the fact that Baxter could not find any case law in support of its positions or proposals.

In summary, Inviro's motion to add the second counterclaim should be granted because: (1) Baxter has not disputed the facts supporting the counterclaim, (2) Inviro's motion amends the pleadings in line with the facts of the case – as recently provided by Baxter, (3) Inviro promptly filed its motion upon learning the information and upon confirming the information by sworn testimony from Baxter, (4) Baxter was in possession of this information – not the movant Inviro, and (5) the counterclaim amendment does not prejudice Baxter because it is Baxter's own actions and information that have resulted in this counterclaim.

Finally, Inviro disputes Baxter's contention that discovery needs to be reopened. Baxter should have completed its homework before asserting its registration or during the two year term of discovery to date. Inviro does not wish to delay this proceeding with the reopening of discovery. Nor does Inviro wish to incur further discovery costs. As a result, Inviro opposes the reopening of discovery or any additional discovery period. However, if the Board decides to grant Baxter's request for any additional discovery period, then Inviro requests that the discovery itself and the discovery period be strictly limited to the fraud issue.

**INVIRO'S OPPOSITION TO BAXTER'S MOTION  
TO AMEND THE NOTICE OF OPPOSITION**

As Baxter states in the second sentence of its motion (page 4, second sentence):

**Baxter no longer believes that its Registration No. 1,821,178,**  
which Inviro wants to attack, **is needed to pursue its claim against**  
**Inviro in this Opposition.**

If this is the case, then the registration should be prejudicially withdrawn or canceled. Baxter should not be allowed to cover-up or cleanse its fraudulent procurement and maintenance of this registration by being permitted to amend its Notice of Opposition to non-prejudicially delete the registration.

Moreover, Inviro has already paid the cancellation fee for this registration and has sought to cancel it on two different grounds. Thus, Inviro submits that Baxter is not legally entitled to amend its Notice of Opposition to non-prejudicially delete the registration.

Further, Baxter has provided no factual or legal support for why it should be allowed to amend its Notice of Opposition after the close of discovery in order to add common law allegations concerning itself. Baxter should not be granted this reprieve and additional relief. Nor would it constitute justice in line with Rule 15(a), Fed.R.Civ.P.

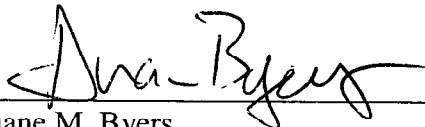
Finally, Inviro would be prejudiced by Baxter's proposed addition of common law allegations for which Inviro has not had the opportunity to obtain written and oral discovery (nor does Inviro wish to reopen discovery and spend more money). Discovery closed in December 2003. It is simply too late in the game for Baxter to add other information concerning its alleged common law activities – in a back door effort to remedy its fraudulent registration.

### CONCLUSION

Baxter's recent document production and testimony in December 2003 has revealed that it fraudulently procured Registration No. 1,821,178 and fraudulently maintained Registration No. 1,821,178. Justice requires that Inviro be permitted to amend its Answer and Counterclaim and seek the cancellation of the registration on this ground, and that Baxter's request to reopen discovery and amend its Notice of Opposition be denied.

Respectfully submitted,

Date: February 4, 2004

  
\_\_\_\_\_  
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Nixon & Vanderhye P.C.  
1100 North Glebe Road, Suite 800  
Arlington, VA 22201-4714  
Telephone 703-816-4009

Attorneys for Applicant,  
Inviro Medical Devices Ltd.

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of INVIRO'S REPLY IN SUPPORT OF ITS MOTION TO AMEND ANSWER AND COUNTERCLAIM, AND INVIRO'S OPPOSITION TO BAXTER'S MOTION TO AMEND NOTICE OF OPPOSITION was served this 4 day of Feb., 2004, via first class mail, postage prepaid, on counsel for Opposer:

Elizabeth Diskin  
LEYDIG, VOIT & MAYER, LTD.  
Two Prudential Plaza - Suite 4900  
Chicago, Illinois 60601

  
\_\_\_\_\_

**From:** Duane Byers  
**To:** ediskin@leydig.com  
**Date:** 10/28/03 10:51:07 PM  
**Subject:** Re: Baxter v. Inviro--US opposition

File  
**A**

Dear Elizabeth,

Finally, please supplement Baxter's responses and document production, or confirm that Baxter has no more responsive information to our earlier requests.

Thanks,  
Duane

**EXHIBIT**

**A**

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\*RESIDENT IN SEATTLE OFFICE

Duane M. Byers, Esq.  
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1100 North Glebe Road, 8th Floor  
Arlington, VA 22201-4714

Re: **Baxter v. Inviro Medical Devices, Ltd.**  
**Opposition of ULTRALINK**  
**Opposition No. 91150298**  
**Our Reference: 213453**

Dear Duane,

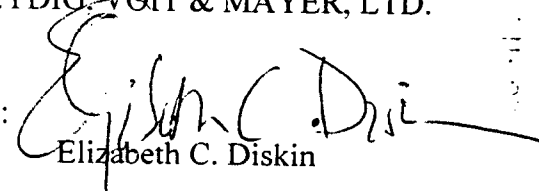
As we discussed earlier this morning, enclosed please find additional documents we believe are responsive to your latest production request. As you will note, every document is confidential and we expect them to be reviewed in accordance with the Protective Order.

Please call with any questions or comments.

Very truly yours,

LEYDIG, VOIT & MAYER, LTD.

By:

  
Elizabeth C. Diskin

ECD/jh  
Enclosures  
cc: Lynn Sullivan



**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Baxter International Inc.,	)	
	)	
Opposer,	)	
	)	
v.	)	Opposition No. 91-150298
	)	
Inviro Medical Devices, Ltd.,	)	
	)	
Applicant.	)	

**APPLICANT'S FIRST NOTICE OF DEPOSITIONS**

PLEASE TAKE NOTICE that Applicant, Inviro Medical Devices, Ltd. ("Inviro"), will take the depositions, pursuant to Rule 30(b)(1), Fed.R.Civ.P., of the following person or persons designated by Opposer, Baxter International Inc. ("Baxter"):

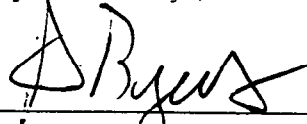
1. Baxter person most responsible for Baxter's adoption and usage of the INTERLINK trademark in the United States.
2. Baxter person most responsible for Baxter's assertion of the INTERLINK trademark against Inviro's U.S. trademark application for the ULTRALINK mark.
3. Baxter person most responsible for overseeing Baxter's licensing of the INTERLINK trademark in the United States.
4. Baxter person most responsible for Baxter's policing or lack of policing of the INTERLINK trademark.
5. Highest ranking Baxter executive who is concerned about Inviro's ULTRALINK trademark application in the United States.
6. Baxter person responsible for Baxter not opposing Inviro's UNILINK trademark application in the United States.



7. Baxter person responsible for Baxter not opposing other third party LINK marks in the United States in the medical field.

The depositions shall be held on December 5, 2003, beginning at 10:00 a.m. (EST) at the offices of Baxter International Inc., or at a mutually agreeable time and place. The depositions shall be taken before a Notary Public authorized by law to administer oaths and to take deposition testimony, and shall continue until completed. The depositions shall be upon oral examination or by telephone examination under, and for all uses and purposes provided in, the Federal Rules of Civil Procedure and the Trademark Rules of Practice. You are invited to attend the depositions and cross-examine.

Inviro Medical Devices, Ltd.,  
By its Attorneys,



Duane M. Byers  
Nixon & Vanderhye, P.C.  
1100 North Glebe Road, Suite 800  
Arlington, Virginia 22201  
703-816-4000

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Applicant's First Notice of Depositions was served by facsimile and by first class mail, postage prepaid, on counsel of record for Opposer at the following address on Nov. 5, 2003:

Lynn A. Sullivan - fax 312-616-5700  
Elizabeth C. Diskin  
LEYDIG, VOIT & MAYER, LTD.  
Two Prudential Plaza - Suite 4900  
Chicago, Illinois 60601



**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Baxter International Inc.,	)	
	)	
Opposer,	)	
	)	
v.	)	Opposition No. 91-150298
	)	
Inviro Medical Devices, Ltd.,	)	
	)	
Applicant.	)	

**APPLICANT'S SECOND NOTICE OF DEPOSITIONS**

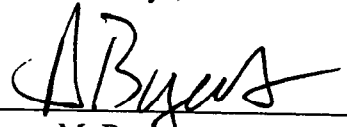
PLEASE TAKE NOTICE that Applicant, Inviro Medical Devices, Ltd. ("Inviro"), will take the depositions, pursuant to Rule 30(b)(6), Fed.R.Civ.P., of the following person or persons designated by Opposer, Baxter International Inc. ("Baxter"), most knowledgeable about:

1. Baxter's adoption and usage of the INTERLINK trademark in the United States.
2. Baxter's assertion of the INTERLINK trademark against Inviro's U.S. trademark application for the ULTRALINK mark.
3. Baxter's licensing of the INTERLINK trademark in the United States.
4. Baxter's policing or lack of policing of the INTERLINK trademark.
5. Baxter's alleged likelihood of confusion between the INTERLINK trademark and the ULTRALINK trademark of U.S. application serial no. 76-151,380.
6. Baxter not opposing Inviro's UNILINK trademark application in the United States.

7. Baxter not opposing other third party LINK trademarks in the United States in the medical field.
8. Baxter's oppositions or objections against other LINK trademarks in the United States.
9. Baxter's settlement communications to or from third parties (including but not limited to settlement discussions and communications concerning US Trademark Opposition 91-125,303 and all other US Trademark Oppositions concerning the INTERLINK mark).

The depositions shall be held on December 8, 2003, beginning at 10:00 a.m. (EST) at the offices of Baxter International Inc., or at a mutually agreeable time and place. The depositions shall be taken before a Notary Public authorized by law to administer oaths and to take deposition testimony, and shall continue until completed. The depositions shall be upon oral examination or by telephone examination under, and for all uses and purposes provided in, the Federal Rules of Civil Procedure and the Trademark Rules of Practice. You are invited to attend the depositions and cross-examine.

Inviro Medical Devices, Ltd.,  
By its Attorneys,



Duane M. Byers  
Nixon & Vanderhye, P.C.  
1100 North Glebe Road, Suite 800  
Arlington, Virginia 22201  
703-816-4000

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Applicant's Second Notice of Depositions was served by facsimile and by first class mail, postage prepaid, on counsel of record for Opposer at the following address on Nov. 5, 2003:

Lynn A. Sullivan - fax 312-616-5700  
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LEYDIG, VOIT & MAYER, LTD.  
Two Prudential Plaza - Suite 4900  
Chicago, Illinois 60601

DByer

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Baxter International Inc.,	)	
	)	
Opposer,	)	
	)	
v.	)	Opposition No.: 91150298
	)	Application No. 76/151,380
Inviro Medical Devices, Ltd.	)	
	)	
Applicant.	)	

NOTICE OF ORAL DEPOSITION OF INVIRO MEDICAL DEVICES,  
PURSUANT TO F.R.C.P. 30(B)(6)  
AND BOARD ORDER OF SEPTEMBER 25, 2003

In accordance with the Board's Order of September 25, 2003, granting Opposer, Baxter International Inc., (hereinafter Baxter) its request to take the oral deposition of Inviro Medical Devices in Canada, and pursuant to 37 C.F.R. § 2.120(c), Baxter will take the oral deposition of Inviro Medical Devices on Monday, December 8, 2003 at 10:00 a.m. and shall continue day to day (excluding Saturdays, Sundays and holidays) until completed. The deposition will occur at the offices of Adams & Phelps Reporting & Video Ltd, located at 1075 W. Georgia Street, Suite 1430, in Vancouver, B.C. V6E 3C9, before a Notary Public or other officer authorized by law to administer oaths and will be recorded by stenographic means.

The deposition of Inviro Medical Devices will be taken through the officers, directors, or other persons designated by Inviro, pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure as being the person or persons competent to testify on behalf of Inviro concerning the following matters. Baxter requests verification via facsimile of the person(s) designated to testify no less than five days prior to the deposition date,

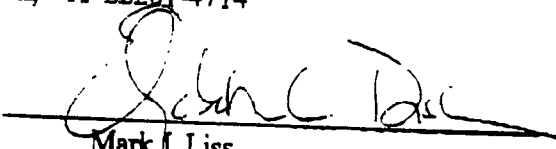
EXHIBIT

C

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the attached NOTICE OF ORAL DEPOSITION OF INVIVO MEDICAL DEVICES, PURSUANT TO F.R.C.P. 30(B)(6) AND BOARD ORDER OF SEPTEMBER 25, 2003 was served on this 5<sup>th</sup> day of November, 2003 via facsimile and U.S. mail to:

Duane M. Byers  
Nixon & Vanderhye P.C.  
1100 North Glebe Road, 8th Floor  
Arlington, VA 22201-4714

  
Mark J. Liss

Lynn A. Sullivan

Elizabeth C. Diskin

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Two Prudential Plaza - Suite 4900

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Attorneys for Opposer